

**BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF  
DELAWARE**

**IN THE MATTER OF THE INITIAL )  
APPLICATION OF TIMBER CREEK )  
FACILITIES, LLC FOR A CERTIFICATE )  
OF PUBLIC CONVENIENCE AND )  
NECESSITY TO PROVIDE WASTEWATER ) DOCKET NO: 22-0306  
SERVICES TO THE DEVELOPMENT OF )  
CAPTAINS WAY LOCATED SOUTHEAST )  
OF THE TOWN OF ELLENDALE IN )  
SUSSEX COUNTY, DELAWARE )  
(Filed April 18, 2022) )**

**APPLICANT’S OPPOSITION TO  
ARTESIAN’S REQUEST TO INTERVENE**

COMES NOW Timber Creek Facilities, LLC (the “Applicant”), by and through the undersigned counsel, who hereby objects to the Request to Intervene (the “Request”) filed in the above-captioned matter on May 16, 2022 by Artesian Water Company, Inc., Artesian Wastewater Management, Inc., Tidewater Environmental Services, Inc. (“TESI”), d/b/a Artesian Wastewater (collectively “Artesian”). In support of its objection, the Applicant avers as follows:

**Procedural Background.** Artesian seeks to intervene in an application proceeding initiated by Applicant before the Delaware Public Service Commission (“PSC”). Applicant seeks a Certificate of Public Convenience and Necessity (“CPCN”) from the PSC so that it may provide wastewater treatment services and utilities to a newly created subdivision, Captains Way. Captains Way is located

southeast of Ellendale, Delaware in Sussex County, and consists of approximately 301 residential lots.

Applicant filed an application for a CPCN for wastewater utility services for Captains Way on or about April 18, 2022 (the “Application”). Applicant owns and operates the preexisting wastewater system that provides wastewater services to Captains Way. Applicant has contracted with Coastal Operations for the staffing and operation of wastewater utility services. The licensed operators from Coastal Operations who will be manning and operating Applicant’s facility are Dave Weed, Tom Heroldt, and John Marion. According to Artesian’s Request, some or all three of these licensed operators are current or former employees of the Middlesex Water Company. Middlesex Water Company is a competitor of Artesian, and recently sold TESI to Artesian.

**Nature of the Request.** Artesian seeks to intervene and have unbridled participation in the Application proceedings before the PSC based on three grounds. First, Artesian claims its interest is to ensure “that private wastewater operations are conducted in a manner that is adequate, reliable, and safe for Delaware’s citizens and the environment” because, “[a]s the largest private wastewater utility in the state, Artesian has a unique responsibility” to safeguard the environment against “unsafe or inadequate wastewater treatment.” Artesian implies that as a “smaller

system[],” Applicant is unable to provide sufficiently safe, adequate, and reliable services to the customers in the proposed CPCN area.

Second, Artesian complains that it—not the PSC—has insufficient information from the Application to assess whether Applicant will operate Captains Way’s wastewater system without adversely impacting Delawareans, the environment, or Artesian’s “nearby water and wastewater infrastructure or operations.” The Request does not identify where Artesian’s wastewater infrastructure or operations are located nor how granting a CPCN to Applicant could adversely impact such infrastructure or operations. Instead, the Request claims, with no citation, example, evidence, or proof that “[h]istorically, larger wastewater utilities have been forced to assume . . . responsibility for smaller wastewater treatment systems, such as the proposed Captains Way system, in order to avoid such adverse impacts.” No “adverse impacts” are cited.

Lastly, Artesian complains that the Application was not signed or submitted to the PSC by a Delaware attorney. No reason is provided in the Request that explains or describes how this *pro forma* defect in the Application impacts or affects Artesian.

**Standard of Review.** Under the PSC Rules of Practice and Procedure, a putative intervenor must provide a description of its interest in the outcome of the proceeding, provide a concise statement as to why its interests are not adequately

represented by the parties to the proceeding, and describe how its involvement in the proceeding will be in the public interest.<sup>1</sup> A putative intervenor's standing is essential to the PSC's analysis and decision to grant intervention.<sup>2</sup>

*Standing.* Standing is “the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance.”<sup>3</sup> Standing concerns who may mount a legal challenge, not the claim's merits.<sup>4</sup> To establish standing:

a party must have suffered an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute. The invasion must be 1) concrete and particularized, and b) **“actual or imminent, not ‘conjectural’ or ‘hypothetical’[.]”** Second, “there must be actual connection between the injury and the conduct complained of—the injury has to be ‘fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the [tribunal]. Finally, it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative.”<sup>5</sup>

Generalized grievances shared by the public at large are not a basis for standing.<sup>6</sup> The injury must affect the putative intervenor on a personal and individual level.<sup>7</sup> Although a party may allege both economic and environmental

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<sup>1</sup> See 26 Del. Reg. 1001, Section 2.9.1.

<sup>2</sup> See *Del. Ass'n of Alt. Energy Providers, Inc. v. Chesapeake Util. Corp.*, 2021 WL 1852301, \*4 (Del. Super. May 7, 2021) aff'd *Del. Ass'n of Alt. Energy Providers, Inc. v. Chesapeake Util. Corp.*, 2022 WL 710452 (Del. Mar. 10, 2022).

<sup>3</sup> *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003) (citing *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991)).

<sup>4</sup> *Id.* (citing *Stuart Kingston, Inc.*, 596 A.2d at 1382).

<sup>5</sup> *Oceanport Indus., Inc. v. Wilm. Stevedores, Inc.*, 636 A.2d 892, 904 (Del. 1994) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (emphasis added).

<sup>6</sup> *Dover Historical Soc'y*, 838 A.2d at 1113 (quoting *Duke Power v. Carolina Env'tl Study Group*, 438 U.S. 59, 80 (1978)).

<sup>7</sup> See *Oceanport Indus., Inc.*, 636 A.2d at 904.

injuries when asserting standing, “courts should deny standing to businesses asserting claims only when the companies are motivated solely by protection of their own pecuniary interest and the public interest aspect is so infinitesimal that it ought to be disregarded all together.”<sup>8</sup> And “[t]he mere allegation of a sincere interest in an environmental problem is not sufficient to confer standing.”<sup>9</sup>

Two Delaware Supreme Court decisions provide guidance here. In *Dover Historical Soc’y*, the Dover Historical Society and several individuals, some of whom owned land in Dover’s historic district and some of whom did not, petitioned the Delaware Superior Court on a writ of *certiorari* to review a decision of the City of Dover Planning Commission to approve the construction of a large building within Dover’s historic district.<sup>10</sup> The Superior Court dismissed the writ for lack of standing and the petitioners appealed.<sup>11</sup>

The Delaware Supreme Court determined the petitioners’ concerns arose from a desire to preserve the aesthetics of the district.<sup>12</sup> The Court thus found the Historical Society and the landowners with property in the historic district had standing to dispute the Commission’s decision.<sup>13</sup> The Court affirmed the Superior

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<sup>8</sup> See *Id.* at 905; see also *Id.* at 901-02 (noting that the deterrence of competition from a competing business is an “interest” but alone is insufficient to establish standing).

<sup>9</sup> *Oceanport Indus., Inc.*, 636 A.2d at 905 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)); see also *Dover Historical Soc’y*, 838 A.2d at 1116.

<sup>10</sup> *Dover Historical Soc’y*, 838 A.2d at 1104.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1114.

<sup>13</sup> *Id.* at 1114-16.

Court’s dismissal of the petitioners that did not live or own property in the historic district because they had not alleged facts showing they had an interest “distinguishable from the public at large or that they w[ould] realize a direct harm from the decision of the . . . Commission.”<sup>14</sup>

In *Oceanport Indus., Inc. v. Wilm. Stevedores, Inc.*, the Delaware Supreme Court reviewed the Delaware Superior Court’s reversal of a decision of the Environmental Appeals Board (“EAB”) to issue an environmental permit to the petitioner which would allow the petitioner to engage in heavy industry in a coastal zone.<sup>15</sup> The Superior Court had ruled that the respondent had standing to appeal DNREC’s issuance of the environmental permit.<sup>16</sup> Importantly, the respondent was a competitor of the petitioner at the Port of Wilmington and cited both economic and environmental concerns associated with the issuance of the permit.<sup>17</sup> The respondent was concerned with keeping the Delaware River navigable in the event of an oil spill to prevent harm to both the environment and its business.<sup>18</sup>

The Delaware Supreme Court determined the respondent could not satisfy the first prong of the standing test, a “concrete and particularized” injury, with its environmental concerns because it could not show that the “environmental injury

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<sup>14</sup> *Id.*

<sup>15</sup> *Oceanport Indus.*, 686 A.2d at 896-99.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 896-97, 901.

<sup>18</sup> *Id.* at 899, 901.

w[ould] actually affect it” in a manner distinguishable from the public at large.<sup>19</sup> The Court also noted that although the respondent’s alleged pecuniary loss could satisfy the first standing element, the alleged injury failed under the second prong of the standing test because the injury did not fall within the “zone of interest sought to be protected or regulated by the statute.”<sup>20</sup> The Court noted the purpose of the statutes relied on by the respondent and at issue in the EAB’s decision, chapters 60, 70, and 72 of Title 7 of the Delaware Code, was “environmental protection in the public interest.”<sup>21</sup> It also noted that the treat of a pecuniary loss to a competitor, alone, is insufficient to confer standing.<sup>22</sup> As a result, the respondent’s economic interests did not fall within the zone of interests to be protected and thus standing did not exist.<sup>23</sup>

*Application.* Artesian lacks standing to intervene in this matter. First, Artesian contends that, as Delaware’s largest private wastewater treatment provider, it has some responsibility to protect the public. However, protecting the public is the role of the PSC and the Division of the Public Advocate (“DPA”).<sup>24</sup> It is not Artesian’s role. Notably, the PSC’s Regulations grant the DPA the ability to

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<sup>19</sup> *Id.* at 905.

<sup>20</sup> *Id.* at 905-06.

<sup>21</sup> *Id.* at 901, 906.

<sup>22</sup> *Id.* at 905.

<sup>23</sup> *Id.* at 906-07.

<sup>24</sup> *See* 29 *Del. C.* §8716.

intervene in any proceeding before the PSC as a matter of right.<sup>25</sup> If any party has standing to intervene in these proceedings, on behalf of the public (or to “protect” the public’s interest), it is the DPA, not Artesian.

Because it is not Artesian’s role to “protect the public,” Artesian has failed to articulate any interest in the Application which would not be adequately represented by the DPA. Even if Artesian could represent the public, which it does not, Artesian has failed to demonstrate why its participation in these proceedings would be in the public interest rather than merely serving its own competitive interests which are insufficient to confer standing. If anything, Artesian’s argument only highlights that its interests are the same as any other member of the community, making its complaints merely generalized grievances, which are inadequate to confer standing.

Second, Artesian contends that it has an interest in these proceedings because it does not have enough information to assess the application to determine if its services and infrastructure will be adversely impacted by Applicant’s operations. However, Artesian has failed to identify the location of any of its operations in relation to Captains Way given its claims that Applicant’s operation of a wastewater facility could, hypothetically, impact Artesian’s wastewater systems and operations. The reason Artesian fails to provide this information is because Artesian’s wastewater systems and operations are located nowhere near Captains Way.

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<sup>25</sup> See 26 Del. Reg. 1001, Section 2.1.4.



Attached to this memorandum as Exhibit A is an aerial rendering of Applicant's wastewater treatment facility and the surrounding area. As can be seen in Exhibit A, Artesian's closest "operation" is an effluent spray field located a mile and a half away from Applicant's facility. Artesian's closest wastewater treatment facility is located even further away—approximately two and a half miles. Simply put, Artesian is nowhere near the zone of interest or general proximity of Applicant's facility to give it standing to intervene.

Regardless of Artesian's proximity to Applicant's facility, Artesian still has failed to identify a single "adverse impact" that satisfies the standing requirements. Artesian claims that, allegedly, larger wastewater companies have at unknown times in the past been forced to absorb service areas and provide wastewater services to communities after a smaller utility company fails. But this is unsupported conjecture. Notably, Artesian's Request fails to cite any examples of this alleged risk. More critically, Artesian's Request speculates that the Applicant is somehow destined for failure at some unknown point into the future, and that Artesian alone (rather than any other successor utility company) will be forced to come to the rescue by absorbing the service area. Artesian's rampant speculation and bald-faced conjecture on these points fail to provide any credible basis for standing to warrant Artesian's intervention in these proceeding, as Artesian has failed to identify a concrete and particularized injury that is actual or imminent.

Lastly, Artesian has no interest in Applicant's compliance with Delaware Supreme Court Rule 72—that a Delaware barred attorney sign Applicant's pleadings. The PSC is capable of policing its own requirements for filing applications and pleadings. And the PSC, not Artesian, has an interest in ensuring that all parties comply with the PSC's Rules of Practice and Procedure. Artesian has no standing to contest the Application based on this generalized grievance of procedural compliance that frankly has no impact or effect on Artesian.

Further, this procedural matter is purely *pro forma*. For a non-party to have standing to dispute an application before the PSC merely because a party failed to comply with a mere technicality would defy Delaware law regarding standing and defeat the very purpose of a standing analysis—"self-restraint [of a tribunal] to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers.'"<sup>26</sup>

**Conclusion.** Delaware courts have consistently ruled that a competitor does not have standing to intervene in the permitting affairs of another competitor.<sup>27</sup> Obviously, what Artesian is really seeking here—as a competitor seeking to preserve its monopolistic grasp on the provision of wastewater utility services throughout lower Delaware—is veto power over the Application. Thus, the relief which

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<sup>26</sup> *Dover Historical Soc'y*, 838 A.2d at 1111 (citations omitted).

<sup>27</sup> See e.g., *Oceanport Industries, Inc.*, 636 A.2d 892; *Race Track Car Wash, LLC v. City of Dover Planning Comm'n*, 2019 WL 4200623 (Del. Super. 2019).

Artesian ultimately seeks via intervention is not merely a seat at the table (to ensure that the citizens of the proposed service area are “protected”), but rather a complete denial of the Application based upon a simple technicality. This form over substance objection, which can and should be easily remedied, does not provide a legitimate basis for granting Artesian’s Request.

For all of the foregoing reasons, the Applicant respectfully prays that the Commission deny Artesian’s Request to Intervene in these proceedings.

Respectfully submitted,

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